

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

GENE McNARY, COMMISSIONER, IMMIGRATION
AND NATURALIZATION SERVICE, ET AL.,

Petitioners.

v.

HAITIAN CENTERS COUNCIL, INC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICI CURIAE
HAITIAN SERVICE ORGANIZATIONS,
IMMIGRATION GROUPS AND REFUGEE ADVOCATES

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**BRIEF OF AMICI CURIAE HAITIAN SERVICE
ORGANIZATIONS, IMMIGRATION GROUPS, AND
REFUGEE ADVOCATES IN SUPPORT OF
RESPONDENTS**

INTEREST OF AMICI

The American Baptist Churches in the U.S.A. is a national religious denomination of some 6,000 congregations with some 1.5 million members, with national offices in Valley Forge, Pennsylvania. The General Board of the American Baptist Churches in the U.S.A. has adopted a Resolution on Haitian refugees condemning the glaring inequity of the United States

policies as applied to Haitian refugees and appealed to the United States and Attorney General to immediately grant permanent sanctuary to Haitians who have fled to the United States for safety and civil liberty. The Board has urged President Bush to stop the discriminatory exclusion of Haitian boat people and recognize that many are refugees whose lives may be at risk if they are compelled to return to Haiti.

The American Council for Nationalities Service (ACNS) is a national, nonprofit, non-sectarian organization with a 75-year history of service to refugees, immigrants and others in migration. Forty community-based affiliates located throughout the U.S. provide refugee resettlement, immigration counseling, and other supportive services meant to ease the burden of transition both for newcomers and the communities that receive them. Haitian refugees is one of the many groups with which ACNS has worked over the years. ACNS is a member of the National Coalition for Haitian Refugees.

ACNS disagrees strongly with the Executive Order of May 24 returning refugees to Haiti and supports the Brief of *Amici Curiae* to be filed in the case of *Haitian Centers Council, Inc. v. McNary*.

Casa de Proyecto Libertad is a non-profit organization providing pro bono legal services, primarily to refugees in INS detention.

Catholic Community Services is pleased to sign on as a party interested in seeing an end to the policy promulgated in President Bush's Executive Order to summarily return Haitian refugees to Haiti without first determining if they might be political refugees. Catholic Community Services was founded in 1931. Since 1957, it has provided social services to refugees and people seeking political asylum in South Florida. When the first Haitian boat people arrived in 1972, they were assisted with

housing and jobs. Since that time, the agency has not ceased to offer assistance and to act as an advocate on their behalf. More recently, the agency has settled over half of those brought from Guantanamo during the current year.

The Center for Immigrants Rights, Inc. is a not-for-profit legal educational organization that serves immigrant groups in the metropolitan New York area. We support the efforts to rescind the unfounded and anti-humanitarian policy of forced repatriation of Haitian refugee-seekers from the high seas.

The Child Welfare League of America (CWLA) is a 70-year-old organization comprised of 690 child welfare agencies from across the United States. With the more than 200,000 staff members from its member agencies, CWLA works to ensure quality services for over two million abused, neglected, abandoned, homeless and troubled children, youth and families. Because of its concerns about all vulnerable children and families, CWLA has long supported the work of agencies serving refugee children and families and has advocated for policies that support refugees in need of protection. CWLA joins as amicus in this case because given the current conditions in Haiti, the policy of returning refugees to Haiti without a determination of their claims of persecution has and will continue to have a devastating impact on children and their families. The current policy subjects children and their families to serious risks of torture, loss of life, and loss of freedom and violates the principles underlying child welfare policy and practice.

Florida Rural Legal Services, Inc. is a non-profit agency whose mission is to provide a number of effective and high quality legal services to economically disadvantaged individuals and groups in order that they may have legal access to justice. A grant from the Florida Bar foundation has enabled FRLS to open an office in Miami to coordinate the Haitian Guantanamo

cases in Florida. Under terms of the grant, the Miami office of FRLS will coordinate the legal efforts among the various immigration assistance agencies working with the Haitians. This work includes providing legal assistance for the HIV positive Haitians brought from Guantanamo to Miami.

Global Exchange is a non-profit education and action organization dedicated to furthering the understanding between peoples of the first and third worlds. Since 1988, we have had a staff person and consultant in Haiti working with grassroots groups. Our staff person has worked as a journalist for the Christian Science Monitor, the San Francisco Chronicle and National Public Radio. Global Exchange has sponsored speaking tours of Haitian activists. We have also sent a number of fact-finding delegations to Haiti after the September 1991 coup. With this background and understanding of the current Haitian situation we are quite concerned about the plight of the Haitian refugees. There is absolutely no way that their safety can be assured in Haiti. We strongly oppose the Summary Return of the Haitian Refugees.

The Haitian Refugee Center (HRC) is a community based non-profit organization that provides free legal services to indigent Haitian refugees seeking asylum in the United States. In December of 1991 HRC sued the United States Government, *HRC v. Baker*, 953 F.2d 1498 (1992), in an effort to protect the rights of Haitian Refugees fleeing political persecution in Haiti. HRC strongly condemns the new U.S. policy to return all Haitian Refugees to Haiti. HRC supports the Haitian Centers Council in its efforts to secure Justice for the Haitian people.

The International Ladies Garment Workers Union—a union founded in 1900—represents apparel workers all across the United States. The union is concerned about immigration and refugee policy as it effects a significant part of the union

membership. The union subscribes to the Amicus Curiae submitted on behalf of *Haitian Centers Council v. McNary*.

The International Rescue Committee has consistently opposed the forcible repatriation of refugees throughout the world. In addition, it supports the requirement that fair screening policies be implemented to determine refugee status. The Executive Order issued on May 24, 1992 is contrary to international and U.S. law and jeopardizes the life and liberty of those Haitians who fear persecution upon their return.

The International Institute of Boston (IIB) endorses both the spirit and the letter of this *amicus* brief. The IIB is a social service agency which has been assisting refugees and immigrants since its incorporation in 1924. Through its Asylum Representation Project in the Immigration Legal Service Department, the Institute has handled hundreds of asylum cases and requests for assistance. In recent months, we have taken on a considerable number of Guantanamo Haitians escaping after the coup which upset the Aristide government. It is on their behalf, and on behalf of our other asylum clients, present and future, that we sign on to this *amicus* brief.

The International Rescue Committee, which has served refugees here and abroad since 1933, stands ready to provide assistance to Haitian refugees.

The Lawyers' Committee for Civil Rights Under Law of Texas/Immigrant & Refugee Rights Project ("Texas Lawyers' Committee") is a non-profit organization that represents immigrants and refugees in class-action suits and "impact" litigation before the U.S. federal and immigration court systems. The Texas Lawyers' Committee is dedicated to the preservation and advocacy of the rights of those fleeing persecution in their home countries and seeking asylum in the United States under

U.S. immigration law, international law, and treaties to which the United States and Haiti are signatories.

The Lutheran Immigration and Refugee Service (LIRS), a cooperative agency of the Evangelical Lutheran Church in America, the Lutheran Church-Missouri Synod and the Latvian Evangelical Lutheran Church in America, provides a variety of immigration, asylum and refugee-related services. Through its Children's Services, Immigration Services, and First Asylum programs, LIRS has provided assistance to Haitians fleeing persecution in their country. LIRS has actively advocated for the fair treatment of Haitians seeking asylum in the United States.

The Midwest Immigrant Rights Center, a program of Travelers & Immigrants Aid, is a *pro bono publico* political asylum defense project that provides legal representation to low-income immigrants seeking asylum in the United States. The Center's staff has prepared asylum applications for Haitian parolees both in Miami and Chicago, and currently has several Haitian parolee clients. Center staff and volunteers have interviewed dozens of Haitian parolees, and have found that the majority have strong asylum cases, and virtually all have genuine, legitimate fear of persecution in Haiti.

The National Conference of Black Lawyers (NCBL) is an activist legal organization whose membership includes lawyers, judges, law professors, law students, and legal workers. The organization consists of a network of twenty-two state and local chapters, with affiliates in Canada, England, and the Caribbean. Founded in 1968 as an outgrowth of the movement for Black empowerment, NCBL has and continues to work to eliminate racial oppression and racism in the U.S. legal, correctional, and policing systems and advocates the full realization of human rights of Black people both in the United States and abroad. NCBL has long focussed on international issues of human rights,

peace, and development and has participated in and sponsored international conferences, organized fact-finding missions abroad, and maintains Non-Governmental Organization (NGO) status at the United Nations. NCBL recognizes that the executive order recently issued that authorizes the return of Haitian refugees fleeing political persecution is not only an issue of international law and concern but is a matter deeply affecting communities here as well. Erosion of rights for legitimate political refugees impacts the rights of all.

The National Emergency Civil Liberties Committee (NECLC) is a national organization which for over 40 years has been concerned with civil rights, including, for nearly twenty years, the rights of Haitian refugees. NECLC attorneys have served and continue to serve as counsel for Haitian refugees in numerous administrative proceedings and court suits. The NECLC believes that the nonadherence by U.S. government authorities, with regard to the treatment of Haitian refugees, to the mandate of the immigration statute tends not only to unsettle the rights of all refugees but also to undermine equal justice and the rule of law in a democratic society. The prejudgment of the rights of the Haitian boat people is in the last analysis an adverse judgment on the rights of the American people.

National Immigration Project of the National Lawyers Guild/Haiti Asylum Committee recruits and trains law students, legal workers and attorneys to work with Haitian asylum seekers in the United States. For over fifty years the National Lawyers Guild has provided legal assistance to movements for justice and social change in the United States and has supported the aspirations for self determination of those living in other countries. The Haiti Asylum Committee was created to respond to the crisis in legal representation for Haitians fleeing the military regime which overthrew the first democratically elected President of Haiti, Jean Bertrand Aristide. The Guild will

continue this work until President Aristide is restored to power and the U.S. government complies with international and domestic law by respecting the rights of Haitians fleeing persecution in their homeland.

Northwest Immigrant Rights Project (NWIRP) has been providing immigration legal services and advocacy to low-income immigrants and refugees in the Northwest for more than a decade. NWIRP is the only project of its kind in the region, serving more than 6,000 people each year. NWIRP is currently spearheading a project to provide legal representation to a group of Haitian refugees. The refugees are all unaccompanied minors who were screened-in at Guantanamo Bay and are now residing in Western Washington. Our experience demonstrates that these young people have strong political asylum claims and possess a genuine fear that they would suffer persecution if returned to Haiti.

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For now has over 300,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition of liberty and freedom, and to defend it against those who would seek to limit fundamental rights and freedoms. Part of this country's democratic tradition is our long and proud history of providing safe haven to individuals facing political persecution. People For strongly believes that it violates that tradition, as well as international and domestic law, for our great country of immigrants to return individuals who may face political persecution to hostile shores without even a hearing on their plight. People For has participated in administrative and

legislative efforts on this issue, and accordingly joins in this *amicus* brief.

The Refugee Assistance Council is a non-profit organization that provides *pro bono* legal services to indigent aliens who are living or detained in the Laredo, Texas area and who seek asylum in the United States. The Refugee Assistance Council is dedicated to the preservation and advocacy of the rights of those fleeing persecution in their home countries and seeking asylum in the United States under U.S. immigration law, international law, and treaties to which the United States and Haiti are signatories.

Refugees, Immigration and International Ministries Commission of Ecumenical Ministries of Oregon, as a Haitian Service Organization, oversees all matters of international policy and concern, including EMO's refugee ministry, Sponsors Organized to Assist Refugees (SOAR) which has 57 Haitian clients currently.

Throughout the world and through a wide network of international contacts, Refugees International ("RI") monitors and analyzes refugee crises to develop and promote strategies and solutions that address specific refugee needs. Using both quiet diplomacy and the power of public opinion, RI presses governments and international organizations to improve protections for refugees. To maintain independence and objectivity, critical to its work both at home and overseas, RI is funded entirely through individuals, private foundations, and private corporations. In light of the refugee crises that have unfolded in the past year alone, the survival of thousands of refugees depends on RI's ability to speak out on their behalf.

Travelers & Immigrants Aid is a one hundred-year-old social service agency in Chicago which has provided legal and other assistance to immigrants and refugees. The agency has provided services to many Haitian refugees in the past, and is now

providing legal and mental health services to Haitian parolees in the Chicago area. In addition, Travelers & Immigrants Aid staff traveled to Miami during February through April of 1992, assisting the U.S. Catholic Conference in interviewing scores of Haitian parolees and preparing their asylum applications. Travelers & Immigrants Aid believes that all people fleeing persecution in their home countries, including Haitians, should not be repatriated without the opportunity to seek asylum.

On profound historical, moral, and legal grounds, the Union of Councils for Soviet Jews is grateful for the opportunity to support the appeal of the Haitian Centers Counsel, *et al.* in the United States Supreme Court. For more than 20 years, we have been an advocacy organization dedicated to advancing the course of human rights, rule of law, and democracy in the former Soviet Union, with special emphasis on the internationally guaranteed right to leave one's country and return to it without governmental hindrance. Our movement grew out of the conviction that neither Jews, nor any others should ever again face the genocidal calamity of the Holocaust. We will never forget that the first "boat people" were Jewish refugees from Hitler, sailing the same waters as Haitians today, on the St. Louis, only to be turned away from the sanctuary of America's shores. America is today erecting a U.S. Holocaust Memorial Museum on the National Mall, to teach the lessons of the Holocaust and the lessons of democracy—one of which, in the words of Clemenceau, is that to infringe on the rights of one is to infringe on the rights of all. If the land of the free denies due process of law to legitimate claims for asylum and refugee status, we will have lost our moral and legal compass, and forfeited our ability to influence countries even less inclined than we are to offer safe harbors to those fleeing persecution. As a human rights organization, we cannot adopt the position of the passive onlooker. We are bound to join in the Brief of Amici Curiae.

The U.S. Committee for Refugees is a nonprofit, nongovernmental organization that defends the basic human rights of refugees, most fundamentally the principle of *non-refoulement*. USCR also defends the rights of asylum seekers to fair and impartial determination of their status and promotes decent and humane treatment for displaced persons. USCR pursues this mandate on behalf of refugees, asylum seekers, and displaced persons worldwide, regardless of ideology, nationality, race, religion, or social group.

SUMMARY OF ARGUMENT

The Executive's new policy directing the Coast Guard to return refugees to Haiti without even an interview to determine if any have a real fear of persecution contravenes principles of international and domestic law and sets a dangerous precedent for refugees worldwide who are in need of protection.

The violent overthrow of Haiti's first democratically elected president, Jean-Bertrand Aristide, has led to unprecedented numbers of refugees fleeing Haiti. Given the terror which pervades Haiti, many Haitians intercepted in the coming days demonstrably will have credible claims to asylum. Since the current crisis began, Immigration and Naturalization Service ("INS") asylum officers have found more than one-third of the fleeing Haitians to have a "credible fear" of persecution if returned to Haiti. If these determinations were conducted with procedural safeguards, such as allowing Haitians to see lawyers and/or representatives of refugee agencies and human rights groups, this proportion would likely be appreciably higher. By simply turning back boats without an adequate opportunity to hear Haitians' claims of persecution, the Coast Guard will undoubtedly return significant numbers of people who would be in grave danger and who merit asylum.

The announced opportunity for Haitians who fear persecution to "avail themselves of our refugee processing service at our Embassy in Port-au-Prince" offers no real protection since the Embassy is inaccessible to many in the countryside, and to many who fear encountering the Haitian military en route. It also has been extraordinarily restrictive in its decisions on refugee claims. The new policy violates international law and makes a mockery of the United States' support for "first asylum" for refugees elsewhere in the world. This is particularly true in the case of the basically similar group of boat people in Southeast Asia. Defendants' actions create a frightening precedent eroding refugee protections around the world. Countries averse to providing temporary shelter will now be able to cite the *refoulement* of refugees to Haiti as a precedent.

ARGUMENT

Defendants' new policy violates their binding duty not to forcibly return refugees to their persecutors. That duty is imposed both by statute, Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1990) ("INA"), and binding international agreements, United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, Art. I, 1968, 19 U.S.T. 6223, 6276, T.I.A.S. No. 6577 ("Protocol"); 1981 U.S.-Haiti Agreement, Agreement Effected by Exchange of Notes, Sept. 23, 1981 ("1981 U.S.-Haiti Agreement").

The obligations of the United States under Article 33 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, Art. 33, 1989, U.N.T.S. 150 ("Convention"), as applied under Article I of the Protocol, have, at least since the entry into force of the Protocol with respect to the United States on November 1, 1968, applied to actions of the United States with respect to individuals within and outside the United States. Under the obligations imposed by Article 33 of the Convention:

No contracting state shall expel or return ("refouler") a refugee *in any manner whatsoever* to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

(Emphasis added.)

Defendants' policy of encircling Haiti and forcing all those fleeing back to face persecution or even death clearly violates that binding legal obligation.

In the Refugee Act of 1980, Pub. L. No. 96-212, § 203(e), 94 Stat. 102, 107 (1980) ("Refugee Act"), Congress re-affirmed that binding obligation by amending the Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (1990) to conform to the language of the Protocol. As the Supreme Court has stated, "one of Congress' primary purposes was to bring United States refugee law into conformance with the [Protocol]." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436 (1987). Under the Refugee Act, Congress' express intent was to create a *mandatory duty not to return* any alien to a country where such alien's life or freedom would be threatened. Congress mandated that:

The Attorney General *shall not* deport or *return* any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion.

Immigration and Nationality Act § 243(h), 8 U.S.C. § 1253(h) (emphasis added). Again, by the express terms of the INA, defendants' policy of encircling Haiti and forcibly returning refugees to their persecutors is unlawful and cannot stand.

Under the express terms of the 1981 U.S.-Haiti Agreement, the United States agreed that, "[h]aving regard to . . . the international obligations mandated in the Protocol Relating to the Status of Refugees * * * under these arrangements the United States Government does not intend to return to Haiti *any* Haitian migrants whom the United States authorities determine to qualify for refugee status." U.S.-Haiti Agreement, at 1-2 (emphasis added). Defendants may not invoke the Agreement for authority to interdict Haitian vessels and at the same time ignore its very terms.

In sum, as defendants' own Legal Counsel advised in setting up the interdiction program under the 1981 Executive Order, in order to comply with the binding obligations of the United States, Haitians interdicted on the high seas, "must be given an opportunity to substantiate their claims." 5 Op. Off. Legal Counsel 242, 248 (1981). Section 243(h) of the INA, Article 33 of the Convention, and the U.S.-Haiti Agreement all bar the Executive from returning refugees to their persecutors. Defendants' actions far exceed their statutory and constitutional authority, are thus *ultra vires* and must be struck down. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

Respectfully submitted,

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